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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-304

MARSHALL I. TEICHNER,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S REPLY BRIEF

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1. The arguments made in the Brief in Opposition prove the total unfairness of disciplining petitioner on the basis of an evidentiary record made *before* this Court laid down the governing constitutional guidelines in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and *In re Primus*, 436 U.S. 412 (1978). The Brief in Opposition totally ignores the First Amendment interests involved in providing the assistance of counsel to

members of a community on which a major disaster, such as a railroad explosion, has been inflicted. Not a single fact or argument in the Brief in Opposition addresses the need—previously recognized by this Court—of preventing the wholesale eradication of individual claims by a large defendant's saturation of a disaster area with non-lawyer claims agents authorized to contact victims directly and make quick payments in exchange for bargain settlements.

Instead, the Brief in Opposition makes a number of misleading assertions calculated to inflame this Court against petitioner. A full record, in which the true facts could be appraised within the framework of the new constitutional rules, would refute, rather than support, the sanction imposed against petitioner.

2. The Brief in Opposition asserts four principal factual arguments to sustain the judgment below. These assertions are, however, misleading and irrelevant.

a. *The association with Royal.*—Highlighted as a footnote in the first substantive paragraph of the Brief in Opposition is the checkered history of William Royal, the investigator who accompanied petitioner to Decatur. This is a transparent effort to smear by association. Indeed, the Brief in Opposition fails to mention that even the Hearing Board dismissed the count of the complaint which criticized petitioner for associating with Royal (Pet. App. 41a-42a).

b. *The reason for petitioner's visit to Decatur and his communication with the Garners.*—The Brief in Opposition describes petitioner's visit to Decatur and his conversations with the Garners in elaborate detail (Br. in Opp. 2-3) before disclosing that petitioner came to Decatur because he "did have an appointment to talk

with one Robert Lichtenberger" (Br. in Opp. 3)—who had called petitioner's office in Chicago. Nor does the Brief in Opposition recount the fact, described in the opinion of the court below, that a friend and neighbor of Mrs. Garner (Mrs. Stubblefield) had told petitioner that Mrs. Garner "need[ed] good legal advice" and that the friend had "offered to call Mrs. Garner and inform her of the availability of [petitioner's] services" (Pet. App. 17a). Mrs. Garner testified that when she met with petitioner she was "not . . . solicited for any legal contract" by petitioner and that when her husband told petitioner they were not interested in retaining him, petitioner simply left and did not communicate with them again (Adm'r Ex. No. 12, p. 44). Nonetheless, the Illinois Supreme Court disciplined petitioner on its view that "it would have been improper for [petitioner] to have arranged an appointment with the Garners without their having approached him first" (Pet. App. 18a). This conclusion squarely presents the First Amendment issue raised in our Petition for a Writ of Certiorari—*i.e.*, whether an attorney is constitutionally protected in making a telephone inquiry, totally devoid of the high-pressure tactics involved in *Ohralik*, to determine whether a victim of a major disaster (who is among those targeted by the prospective defendant for "a quick and cheap settlement") is interested in retaining counsel, after a friend of the victim has told the attorney that the victim needs legal advice.

Appended hereto is the section pertaining to "Advertising and Solicitation" of the American Bar Association's proposed initial amended draft of the Code of Professional Responsibility. This draft was discussed at the latest ABA National Convention in sessions of the Commission on Evaluation of Professional Standards and

was published in *The Legal Times of Washington*, August 27, 1979, pp. 26-47. The draft of Section 10 reflects the growing sentiment in the legal profession that only "personal solicitation that is overreaching or which occurs in circumstances in which the risk of overreaching is very high" should be prohibited. See Comment on Section 10.2, pp. 5a-6a, *infra*.[1] To deprive petitioner of his livelihood for two years because of the lower court's conclusion that he should not have telephoned the Garners "without their having approached him first" while these new standards are being considered by the American Bar Association would be a great injustice. At the very least, petitioner should have the opportunity to make a factual record relating to his conversations with the Garners and demonstrate thereby that the initiation of the non-coercive contact with Mrs. Garner was constitutionally protected.

c. *The representation of Darryl Hardy*.—Endeavoring to make these facts appear parallel to the overreaching in *Ohralik*, the Brief in Opposition emotionally describes

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[1] New Disciplinary Rule 2-103(A) of the District of Columbia Bar provides:

> A lawyer shall not seek, by in-person contact, his or her employment (or employment of a partner or associate) by a non-lawyer who has not sought his or her advice regarding employment of a lawyer, if:
>
> (1) The solicitation involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR2-101(B); or
>
> (2) The solicitation involves the use of undue influence; or
>
> (3) The potential client is apparently in a physical or mental condition which would make it unlikely that he or she could exercise reasonable, considered judgment as to the selection of a lawyer.

Darryl Hardy as being "in the intensive care burn unit" and as "struggling for his very life" (Br. in Opp. 5). Only as an aside does the Brief in Opposition concede that petitioner "neither talked with, nor was he retained by, Darryl Hardy prior to his death" (Br. in Opp. 5). This concession demonstrates that Hardy's physical condition is totally irrelevant; unlike Ohralik, petitioner did not try to solicit a client who was hospitalized.

In fact, the Brief in Opposition fails to mention that the first communication between petitioner and the Hardy family was initiated by Darryl Hardy's mother, who called petitioner and asked him to come to see her after Darryl Hardy had expressed to his fiancee's mother a desire to sue the railroad (Adm'r Ex. No. 18, pp. 8-9; Pet. 8). Indeed, even the court below recognized that petitioner's contact with Darryl Hardy's mother "was not uninvited" (Pet. App. 21a). Only *after* meeting at her request with Mrs. Hardy, did petitioner go to the hospital in Springfield, as she had asked him to do, and speak with Darryl Hardy's fiancee.

d. *The payment to Robert Lichtenberger*.—Pejoratively describing Lichtenberger—himself a victim of the disaster, who had initially brought petitioner to Decatur with a telephone call—as a "chaser," the Brief in Opposition asserts that the judgment should stand because Lichtenberger was paid $500 (Br. in Opp. 6-7). In fact, Lichtenberger had initially telephoned petitioner after Lichtenberger's "good friend" John Bolero (Tr. 459) had suggested that he call petitioner to discuss possible legal representation. The lower court recognized that Lichtenberger communicated with prospective clients not because he had been promised any financial reward, but because he had caused petitioner to travel to Decatur and then retained another lawyer. Accordingly, "he offered

to make amends to [petitioner] by introducing him to other potential clients" (Pet. App. 24a). Only *after* petitioner had spoken with these clients was money discussed with Lichtenberger or given to him. And petitioner testified that he gave this amount to compensate for Lichtenberger's expected assistance in servicing clients and in investigative work (Tr. 501, 513, 568).

Moreover, there is a fundamental reason why the judgment below, which deprives petitioner of his livelihood for two years, cannot stand solely on the payment to Lichtenberger. This transaction was only one of the nine counts on which the Supreme Court of Illinois based its judgment. It is impossible to tell whether the court below would have sustained so severe a sanction if only this count had withstood constitutional challenge. Thus, a reversal and remand is required even if the payment to Lichtenberger were viewed as beyond the constitutional protection of *Bates and Primus*. *Cf. Greenbelt Pub. Ass'n. v. Bresler*, 398 U.S. 6, 10 (1970); *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

CONCLUSION

At the very least, petitioner should be afforded an opportunity to present the facts relating to the explosion in Decatur, Illinois, against the background of the new constitutional rules announced in cases decided by this Court *after* the hearing was held. The petition for a writ of certiorari should be granted and the judgment reversed or vacated for further evidentiary proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX A – DRAFT OF CODE OF DISCIPLINARY PROCEDURE

AMERICAN BAR ASSOCIATION COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS

(As Published in Legal Times of Washington – August 27, 1979)

10. ADVERTISING AND SOLICITATION

The primary means by which potential client learns about a lawyer is the lawyer's professional reputation. Under modern conditions, however, it is appropriate that lawyers be allowed to make known their services not only through reputation but through organized information campaigns in the form of advertising. Advertising involves active quest for clientele, contrary to the tradition that a lawyer should not seek clientele, but the public's need to know about legal services can be fulfilled in part through private advertising.

In balancing these considerations, the interest in expanding public information about legal services ought to prevail. At the same time, allowing lawyers to provide information about their services, entails the risk of tactics that are misleading or overreaching. Regulation is therefore necessary. The Rules of Professional Conduct governing advertising and solicitation liberally permit public dissemination of truthful information about legal services, while prohibiting misleading communications and restricting direct solicitation.

Even if a lawyer advertises, sustained success in practice depends on professional reputation. Professional reputation is established by consistent perfor-

mance with skill and diligence. Hence, whether advertising is involved or not, a successful practice rests on the foundation of competent practice.

10.1 Advertising

(a) A communication about a lawyer's services shall not contain any false, fraudulent, or misleading statement.

(1) A "communication" includes oral statement, mail, professional announcement, telephone directory, legal directory, professional card, newspaper, magazine, radio, television, and any other form of communication.

(2) A communication is false, fraudulent, or misleading if it:

(i) Contains a material misrepresentation of fact or law, omits a fact necessary to make the statement considered as a whole not misleading, or is intended or is likely to create unjustified expection;

(ii) Includes pictorial representation, such as a television picture, that is false, fraudulent, or misleading;

(iii) States or implies that the lawyer can improperly influence a court, tribunal, or official;

(iv) Except as permitted by section 8.3, states or implies that the lawyer is a specialist; or

(v) States or implies the quality of the lawyer's services as compared with other lawyers' services, unless the comparison can be factually substantiated.

(b) Advertising of legal services may contain any information relevant in a potential client's seeking legal assistance, including:

(1) The lawyer's name, address, and telephone number;

(2) The lawyer's educational and other background and the types of legal matters in which the lawyer will accept employment;

(3) The basis on which the lawyer's fees are determined (including prices for specified services), and payment and credit arrangements;

(4) The lawyer's foreign language ability;

(5) Names of references and, with their consent, names of clients regularly represented;

(6) Other information about the lawyer or the lawyer's practice that a reasonable person might regard as relevant in determining whether to seek the lawyer's services.

(c) If a communication about a lawyer's services is made through public media, such as a newspaper, general mailing, or radio or television, a copy or record of the communication in its entirety shall be kept for one year after its dissemination.

(d) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of a communication permitted by those rules.

Advertising can help lay persons in obtaining legal services, particularly persons who have never before employed a lawyer or who have done so infrequently. Lawyer advertising traditionally was prohibited by rules of professional ethics, but is now substantially protected by the Constitution. See *Bates and Osteen v. State Bar of Arizona*, 443 U.S. 350 (1977).

It is universally recognized, however, that there should be prohibitions on false or misleading advertising. Some jurisdictions have more extensive prohibitions, for example against television advertising, against advertising going beyond a few permitted facts about a lawyer, or against "undignified" advertising. Such restrictions may serve the economic interests of some members of the bar but they do not advance the general public interest. Television is now one of the most powerful media for getting information to the lay public, particularly persons of low and middle income; prohibiting television advertising therefore would impede flow of information about legal services to a substantial sector of the public.

Limiting the information that advertising may contain has a similar effect and assumes that Rules of Professional Conduct can accurately forecast the kind of information that is relevant to the public. A prohibition on "undignified" advertising simply would express a matter of taste. Subsection (b) expressly permits advertising various specific matters of information but also permits any information that a lay person might reasonably regard as relevant.

Record of advertising. A record of the content of advertising should be kept in order to facilitate enforcement of this Section.

Paying others to recommend a lawyer. A lawyer should be allowed to pay for advertising permitted by this Section, for example media charges or the cost of participating in a lawyer referral service. Beyond this, a lawyer should not pay another person for channelling professional work. Thus, paying a person to solicit by personal contact with lay persons is prohibited.

However, this restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid organization or prepaid legal services plan may make expenditures to advertise legal services provided under its auspices.

10.2 Solicitation

A lawyer shall not solicit employment:

(a) By any means involving coercion, duress, or vexatious or harrassing conduct; or

(b) By any personal contact initiated by a lawyer, or a person acting on behalf of the lawyer, with a lay person with whom the lawyer does not have an established client-lawyer relationship and who is in custody of a law enforcement agency or under treatment in a hospital, convalescent home, or nursing home; or

(c) By a lay person who has made known a desire not to receive communications from the lawyer.

Personal solicitation by a lawyer or someone on his behalf is subject to regulation under the decisions in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and *In re Primus*, 436 U.S. 412 (1978). As those decisions recognize, personal solicitation can entail risk of overreaching, particularly if the solicitation follows upon an event that is traumatic to the lay person.

At the same time, it is legitimate for a lawyer to obtain professional employment as a consequence of personal acquaintance or encounter with a person who has not previously been a client. This Section therefore prohibits personal solicitation that is overreaching or

which occurs in circumstances in which the risk of overrreaching is very high, as where the client is in jail or hospitalized. It also prohibits a lawyer from soliciting professional work from a person who has previously indicated to the lawyer that the lawyer's services are not wanted.

10.3 Designation of specialization

A lawyer shall not hold himself out as a specialist, except as follows:

(a) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "patents," "patent attorney," "trademark lawyer," or a substantially similar designation;

(b) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty," "admiralty lawyer," or a substantially similar designation;

(c) A lawyer whose practice is limited to an area or field of law may indicate that fact as follows: (applicable provisions on designation of specialization).

Regulations regarding specialization vary from one jurisdiction to another and likely will continue to do so for some time. The Rules of Professional Conduct do not contain such regulations but assume their incorporation in this Section.

References: DR 2-105; EC 2-14.

10.4 Firm names and letterheads

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates section 8.1.

(b) A list of a firm's members or associates in a firm name, letterhead, or other professional designation containing the firm's address shall indicate any lawyers not admitted in the jurisdiction in which that address is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a firm, or in advertising on its behalf, during any significant period in which the lawyer is not actively and regularly practicing with the firm.

A firm's name should not be misleading. The use of a trade name is not prohibited if it conforms to this standard. In particular, it is permissible to use in a firm name the names of former members of the firm as long as no confusion results as to the identity of the firm.

References: DR 2-102 (B); EC 2-11 through 2-13.